

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BLAU PAR CORPORATION	:	DETERMINATION
AND HENRY J. RICCA, AS OFFICER	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through August 31, 1987.	:	

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Petitioners, Blau Par Corporation and Henry J. Ricca, as officer, Route 303, Blauvelt, New York 10913, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through August 31, 1987 (File No. 807585).

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on April 30, 1990 at 1:30 P.M. and was continued to conclusion before the same Administrative Law Judge at the same location on September 18, 1990 at 1:45 P.M., with all briefs to be submitted by December 20, 1990. Petitioners appeared on both hearing dates by Aaron G. Windheim, Esq. The Division of Taxation appeared on both hearing dates by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioner's request for a conciliation conference was timely filed.

FINDINGS OF FACT

Petitioner Blau Par Corporation d/b/a Bubbles ("the corporation") operated during the period in question as a bar/lounge offering food, drink and entertainment in the form of topless dancers. Petitioner Henry J. Ricca is the president of the corporate petitioner.

In or about February of 1987, the Division of Taxation commenced a field audit of the operations of the corporate petitioner. As a result of its audit, the Division determined that a sales and use tax liability existed and the issuance of assessments to reflect the same was recommended.

Introduced in evidence were three notices of determination and demands for payment of sales and use taxes due, indicating the taxpayer to be Blau Par Corporation d/b/a Bubbles with an address at Route 303, Blauvelt, New York 10913. These notices are all dated (on their face) June 10, 1988 and reflect the following information:

<u>Notice Number</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	
S880610007L	3/1/84-8/31/87		\$77,768.61	\$20,197.50	\$26,131.96
S880610008L	9/1/87-2/28/88		12,470.92	1,683.79	580.36
S880610009L <sup>1</sup>	6/1/85-2/28/88	--		6,253.02	--

Also introduced in evidence were two additional notices of determination and demands for payment of sales and use taxes due, indicating the taxpayer to be Henry J. Ricca, as president of Blau Par Corp. d/b/a Bubbles, with an address at 6 Sierra Vista, Valley Cottage, New York 10989. These notices are each dated (on their face) June 10, 1988

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This notice represents the assessment of omnibus penalty only.

and indicate the following information:

<u>Notice Number</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	
S880610005L <sup>1</sup>	12/1/85-2/28/88		\$51,870.00	\$11,755.91	\$8,390.18
S880610006L <sup>1</sup>	12/1/85-2/28/88	--		5,187.01	--

Also introduced in evidence were return receipts for certified mailings by the Division of Taxation. The first of these return receipts indicates a mailing by certified mail addressed to the corporate petitioner at its Route 303, Blauvelt, New York address. The receipt reflects a June 16, 1988 delivery date; the signature of the person accepting delivery on behalf of the corporation is illegible. The second return receipt for certified mailing indicates a mailing by certified mail addressed to petitioner Henry J. Ricca, as president of the corporate petitioner, at his 6 Sierra Vista, Valley Cottage, New York address. This return receipt reflects a June 15, 1988 delivery date. Again, the signature of the person accepting delivery is illegible.

On April 6, 1989, a letter was submitted to the Division of Taxation's Bureau of Conciliation and Mediation Services ("BCMS") seeking a conference. This letter provides as follows:

"SUBJECT: Blau-Par Corp. Assessment - Sales Tax Audit

Ref.: Request for an informal or formal hearing

TO.: Mediation and Conciliation Bureau in the latter part of 1987 or early part of 1988.

The original audit by your sales tax examiner indicated a liability of \$40,000.00. We agreed to this, but it was boosted to 140,000.00 by his supervisor [sic] for lack of records indicating an arbitrary assessment.

I then indicated to my accountant Mr. Jackson and in a memo to Mr. Derrico before a 90 day period could elapse, to protest and ask for an informal hearing.

An appearance before your referee was in vain, he informed me he had no letter.

My accountant indicated he had send [sic] it out, but did not register it. I deem it unfair to deny me a hearing because my accountant was careless or my letter was lost in the mail somewhere.

The assessment is based on 1988 prices and the audit is projected to 1985, when prices were at least 50% less.

A hearing should be granted in fairness to me." (Emphasis added.)

Attached to the items submitted as part of the above-quoted conference request was a copy of a letter from the auditor to petitioner Henry Ricca. This letter, dated May 12, 1988, indicates that as of its date, the audit was to be updated to include periods beyond the original audit period of March 1, 1984 through November 30, 1986. A handwritten notation at the bottom of the auditor's May 12, 1988 letter provides as follows:

"I have a power of attorney to include period. The enclosed is a conciliation form filed by my client on time. This is for the entire period. You did not grant me a conference at all."

This handwritten notation is signed "Alexander", presumably being petitioner's former accountant and representative in these matters, one Alexander Jackson.

On June 9, 1989, an order was issued by BCMS dismissing petitioner's request for conciliation conference. This order states that the conciliation request was denied as not filed within 90 days from the issuance date of the statutory notices of determination. More specifically, the order indicates that the notices were issued on June 10, 1988, but the request for conference was not mailed until April 8, 1989.<sup>2</sup>

Petitioners timely filed a petition with the Division of Tax Appeals challenging the conciliation order as issued. This petition asserts that the Commissioner of Taxation and Finance erred by "failing to properly notify petitioners of the assessments," and alleges that "no assessment notice or demand was ever properly served on petitioners".

The audit report in this matter includes the auditor's "action sheets", a contemporaneously completed handwritten log listing, in summary comments, the auditor's contacts with the taxpayer (or representative), and detailing the various actions undertaken by the auditor throughout the case. In addition to the written audit report the auditor, one Arye Wolkowski, appeared and testified at the hearing.

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<sup>2</sup>The April 8, 1989 date indicated on the face of the conciliation order appears to be in error, with the actual date of mailing of the request for conference being the April 6, 1989 U.S. Postal Service postmark date stamped on the envelope in which the conciliation request was mailed.

Introduced in evidence was an envelope addressed to Alexander Jackson at 2 Sharon Drive, New City, New York 10956, as well as a certified mail return receipt card attached to the back thereof. This envelope bears a U.S. Postal Service postmark of June 14, 1988 and indicates on its face that the same was returned to the Department of Taxation and Finance as "unclaimed". This envelope also contains on its face a U.S. Postal Service list indicating a "first notice" (presumably first delivery attempt) date of June 15, 1988, a "second notice" date of June 21, 1988 and a "returned to sender" (the Division) as "unclaimed" date of July 1, 1988.

Also included

in evidence was a return receipt for certified mailing indicating a certified mailing to Alexander Jackson, 2 Sharon Drive, New City, New York 10956. This return receipt reflects the signature "Alexander" and "8-5-88" (presumably the date of delivery). This return receipt is stamped as received back by the Division of Taxation at its Westchester District Office, Sales Tax Section, on August 10, 1988.

The auditor's action sheets list entries for August 3, 1988 which read as follows:

"Copies of assessment to Jackson at 2 Sharon Drive, New City was [sic] returned from the Post Office 'unclaimed'."

"Spoke to Jackson and scheduled appointment for this office on 8/31/88 at 9:30 A.M. Also asked him why he didn't accept certified letter to him. He gave no answer -- told him I will resend assessment. Sent assessment certified mail to Jackson."

A subsequent entry, dated August 10, 1988, reads "return receipt from Jackson received."

The auditor's action sheets also include an entry on June 14, 1988. This entry, in the handwriting of and made by the auditor's supervisor, one Helen McCarthy, reads as follows:

"Notice Numbers S880610005L and 06L mailed in one envelope to Ricca and 07L, 08L and 09L mailed in one envelope to Corp. Notice Numbers S880610005L, 06L, 07L, 08L, and 09L, mailed in one envelope to Jackson P/O/A."

This entry bears the initials "H. Mc".

The May 12, 1988 letter, referred to in Finding of Fact "7", is specifically referenced on the auditor's action sheets as having been sent to Henry J. Ricca on May 12, 1988. Each of the

return receipts in evidence (see Findings of Fact "5" and "11") bear the name Wolkowski (the auditor) as the person to whom they should be directed upon return.

The audit documents in evidence include validated waivers with respect to the period of limitations on assessment, the latest of which allows assessment for the period in question to be made at any time on or before June 20, 1988. The audit report also indicates that the assessments in question were issued by the Westchester District Office on June 14, 1988, with such date being handwritten in place of the June 10, 1988 date initially typed on the report.

The auditor testified during the first hearing that it is the practice of his office (the Division's Westchester District Office) to mail all assessments against a single taxpayer in one envelope. The auditor also testified that he directed the assessments in question to be prepared and that the only reason that he did not mail them personally was because he was out of the office on leave for two weeks due to the birth of his daughter. The auditor testified he believed the signatures on the return receipts were made by petitioner Henry J. Ricca, based upon his comparison of the signatures on the return receipt cards to signatures on the above-noted waivers extending the statute of limitations as well as on a power of attorney executed by Mr. Ricca. The auditor testified that due to his absence from the office for the two-week period, his supervisor Helen McCarthy had to handle the mailing of the assessments in question.

Petitioner Henry J. Ricca testified during the first hearing as follows:

"Question: Did you ever personally receive any of the notices of assessment that are on this table, that have been marked in evidence, by certified mail?

Answer: No sir."

Petitioner Henry J. Ricca further testified at the continued hearing that during the period June 1988 through September 1988 he was in ill health, suffering from a bad back, and that he was working for the corporate petitioner on an "on and off" basis at such time. He was ultimately hospitalized in October 1988 for back problems.

At the conclusion of proceedings on the second hearing date, the Division's representative, after responding "No" to a question as to whether he wished to provide additional documents or witnesses, went on to state that he wanted to submit an affidavit, after

conclusion of the hearing, from the person (presumably the auditor's supervisor, Ms. McCarthy) who allegedly mailed the assessments. Petitioner's counsel objected and the Division's request was denied by the Administrative Law Judge upon the basis that the Division had already been afforded sufficient time between the initial hearing date and the continued hearing date to decide whether to produce either the proposed affiant for testimony at the continued hearing date or, alternatively, to prepare and submit an affidavit.

#### CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides for the issuance of assessments such as those at issue herein, and also affords taxpayers an opportunity for a hearing to contest the same. This section provides, insofar as is pertinent, the following:

"Notice of such determination [of tax due] shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing...."

B. As an alternative to petitioning for a hearing in the Division of Tax Appeals, the taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services ['BCMS'] (see 20 NYCRR 4000.3[a])." Tax Law § 170.3-a(a) provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation, or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed" (emphasis added).

The "time to petition for such a hearing" language of Tax Law § 170.3-a imposes the statutory 90-day petition time period upon the request for conciliation conference alternative. The timely filing of a written request, and one conformed copy, with the BCMS "suspends the running of the period of limitations for the filing of a petition for a hearing" (20 NYCRR 4000.3[c]).

C. Tax Law § 1147(a)(1) requires the statutory notice under Tax Law § 1138(a) to be given as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed..." (emphasis supplied).

D. In this case, a request for conciliation conference was denied upon the basis that such request had been filed more than 90 days after issuance of the notices of determination. The petition, in turn, challenges such order denying the conciliation conference by alleging, inter alia, that the notices were never properly served on petitioners. Given this allegation, it becomes necessary to examine the facts and circumstances surrounding issuance of the subject notices to determine whether such issuance was in compliance with the mandates of Tax Law § 1147(a)(1). Such examination is critical, for if it is determined that the Division of Taxation failed to comply with the requirements of said section, the subject notices would be invalid and the Division would apparently be precluded from reissuing the same by operation of the statute of limitations (Tax Law § 1147[b]). By contrast, should it be determined that the notices were properly issued, petitioners' request for conciliation conference filed approximately some 10 months subsequent to issuance of the notices would clearly be untimely as in excess of 90 days after the date of issuance of the notices and the assessments would have become fixed and irrevocable pursuant to Tax Law § 1138(a).

E. The evidence viewed as a whole supports a conclusion that the subject notices were properly mailed by certified mail to petitioners on June 14, 1988, as well as to petitioners' then-appointed representative, one Alexander Jackson, on the same date. Evidence supporting this conclusion includes the testimony of the auditor as to his office's regular practice with respect to mailing notices, together with the certified mail return receipts and the various entries in the auditor's action sheets as detailed. These action sheets, constituting a contemporaneously prepared business record of the Division, support a conclusion that the assessments in question were prepared at the auditor's direction and were subsequently mailed by the auditor's supervisor on June 14, 1988. There is a specific entry dated June 14, 1988 detailing the



assessments by number and the fact that they were mailed to petitioners by the auditor's supervisor on such date. As noted, return receipts were delivered back to the Division, to the auditor's attention, shortly thereafter. In addition, there are other entries in the action sheets, as described, indicating the mailing of copies of the assessments to petitioners' then-appointed representative on June 14, 1988, the initial non-delivery thereof, and the ultimate acceptance thereof by said appointed representative.

Contrasted with this evidence is the nature of petitioners' claim herein. More specifically, the tenor of petitioner Henry Ricca's April 6, 1989 letter requesting a conciliation conference indicates that petitioner Henry Ricca had received the assessments in question and had both directed his appointed representative to protest and had also allegedly written a letter or memorandum himself protesting the assessments prior to expiration of the 90-day period. In fact, Mr. Ricca's letter claims that the accountant's protest letter had been sent but was not registered, and that Mr. Ricca's letter was lost in the mail. No copies of either letter were offered in evidence by petitioners. Further, the statements in Mr. Ricca's letter that he directed his accountant to protest and that he himself protested, contrast directly with his claim via testimony that he never received any of the assessments in question. In fact, the handwritten notation by Mr. Jackson (on the bottom of the auditor's May 12, 1988 letter) claiming that a timely request for conciliation conference had been filed, as detailed, indicates the receipt of the assessments in question.<sup>3</sup>

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<sup>3</sup>It is possible that protest letters may have been sent by either Henry Ricca, or his accountant Mr. Jackson, or both. Assuming, arguendo, that such was the case, a careful comparison of dates leaves a good indication that such letters were sent prior to issuance of the statutory notices. More specifically, Mr. Ricca's April 6, 1989 letter seeking a conference references itself to protest letters allegedly sent "in the latter part of 1987 or early part of 1988." This period, however, predates the June 14, 1988 issuance date of the assessments hence rendering the alleged protests as premature and of no effect. In the same manner, Mr. Jackson's handwritten note on the bottom of the auditor's May 12, 1988 letter references an enclosed "conciliation form filed by my client on time." Such reference on the face of the May 12, 1988 letter could only be to a conciliation form filed not only prior to such date but also prior to the June 14, 1988 assessment issuance date.

In sum, the auditor's testimony at hearing details the steps in the audit leading up to issuance of the assessments in question, including a direction that the assessments be prepared. The auditor's action sheets support the circumstances surrounding the issuance, including the specific notation in such contemporaneously maintained record that the assessments were issued on June 14, 1988 by the auditor's supervisor as described. In turn, the certified mail return receipt cards showing mailings to petitioners were delivered back to the Division of Taxation indicating that documents had been delivered to petitioners' respective addresses on June 15 and June 16, 1988. The auditor's name was included on these return receipt cards and the same were associated with the case file in this matter. Accordingly, the evidence supports a conclusion that the subject notices were properly issued on June 14, 1988.<sup>4</sup>

F. In light of the foregoing, it was incumbent upon petitioners to have filed either a request for conciliation conference with BCMS or alternatively, a petition for hearing in the Division of Tax Appeals within 90 days of the June 14, 1988 issuance date of the notices. There is no viable evidence that petitioners did either of these alternative steps.

More specifically, no copies of any timely request for conciliation conference in response to the assessments, as alluded to in petitioners' correspondence of April 6, 1989, have been produced. At best, it appears that petitioners have abandoned their first taken position of timely response, in favor of the position that the assessments were never received. In fact, petitioner Henry Ricca's conflicting claims (i.e. his allegedly timely response was lost in the mail versus his testimony that he never received the assessments) leave both claims of doubtful validity. Put simply, both such claims are rejected as not believable. The evidence as a whole overcomes petitioners' bare claim of non-receipt of the assessments and leads to a conclusion that the

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<sup>4</sup>The Division's request to submit an affidavit from the person who put the assessments in the mail was rejected (see Finding of Fact "19") principally because of the lateness of such offer (after conclusion of the second hearing day). It is noted that even without such affidavit, presumably offered to buttress the Division's position, the evidence as a whole is sufficient to establish that the assessments were properly mailed on June 14, 1988.

conciliation order dismissing the request for conciliation conference as untimely was properly issued. In turn, the assessments in question became fixed and irrevocable and there is no jurisdiction herein to address the merits of the assessments at issue.

G. The petition of Blau Par Corporation and Henry J. Ricca, as officer, is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE